

## **Chapter 44 - Subcontracting Policies and Procedures**

### **Section 44.1 Required Practices Concerning Subcontracts**

#### **44.1.1 PURPOSE**

The purpose of this section is to provide guidance on required procedures when consenting to subcontracts. This guidance addresses issues pertinent to both preaward and postaward subcontracts.

#### **44.1.2 BACKGROUND**

In response to an Office of Inspector General (OIG) audit of subcontract awards by EPA prime contractors and EPA's oversight of prime contractors' use and control of these subcontracts, the Office of Acquisition Management (OAM) agreed to issue guidance reminding Contracting Officers (COs) of required practices when consenting to subcontract. This guidance addresses issues pertinent to the preaward and postaward review of subcontracts.

Subcontracts represent a unique contractual instrument in which the Government has no direct legal relationship with subcontractors, sometimes referred to as no "privity of contract" (defined as that relationship which exists between two contracting parties). There is essentially no relationship between the Government and its subcontractors. The prime contractor is selected for its technical and management abilities, including the right to manage the contract and subcontractors used in the performance of the contract.

Prime contractors are responsible for planning, awarding, and administering subcontracts. However, COs play a key role in subcontract oversight, since they are responsible for the overall prime contract price and performance. COs are responsible for assessing the need for subcontracts, and the additional cost of subcontracting before granting consent. Before granting consent to a subcontract, COs review the adequacy of the prime contractor's cost and price analysis, and determine whether the proposed subcontract costs are realistic for the work to be done.

Finally this section addresses consenting to subcontracts. Specifically, this section clarifies and supersedes three practices identified in a June 8, 1994, OAM memorandum concerning subcontracting: consenting by letter, ceilings, and increasing the estimated amount of subcontracts.

In addition, two other practices regarding subcontracting consent are discussed: the role of the Procuring Contracting Officer (PCO) and the Administrative Contracting Officer (ACO) in the consent process, and the review of the proposed subcontract document.

COs should refer to FAR Part 44 and this section of the CMM for policies and procedures before granting consent to subcontract.

This section was originally issued as a Procurement Policy Notice (PPN) 97-01 dated January 8, 1997, from Betty L. Bailey, Director of the Office of Acquisition Management to OAM Division Directors, Regional Contract Officer Supervisors, and Howard Corcoran, OGC, SUBJECT: Required Practices Concerning Subcontracts.

#### **44.1.3 AUTHORITY/APPLICABILITY (*RESERVED*)**

#### **44.1.4 DEFINITIONS (*RESERVED*) 44.1.5 POLICY**

##### **44.1.5.1 Roles and Responsibilities**

Before consenting to a subcontract, the CO reviews the request and supporting data and considers such factors as: technical need for services, compliance with the prime contract's goals for subcontracting with small disadvantaged business and women-owned business concerns, adequacy of competition, responsibility of the proposed subcontractor, proposed type and terms and conditions of the subcontract, and adequacy and reasonableness of cost or price analysis performed.

The Project Officer (PO) reviews the prime contractor's request for subcontract consent, and provides comments to the CO on the technical need and appropriateness of the supplies or services, the reasonableness of the subcontract estimate in terms of level of effort, and types and quantities of proposed other direct costs; location, duration, number of travelers and purpose of proposed travel; skill level, labor mix, and direct labor hours to be expended; and the capabilities of the proposed subcontractor.

## A) Review of Preaward Subcontracts

## 1) Preaward Team Subcontractors

Preaward team subcontractors are competed as part of the original prime contractor's proposal, which is subject to the competitive evaluation process. During preaward competition, the technical capability and costs of each prime and its subcontract teams are evaluated as a combined entity, which is evaluated against other prime offerers' contract teams. Selection for award is based on the management abilities of the prime contractor, and the combined technical capabilities and price of the prime and its subcontract teams. The CO does not need to comply with FAR Subpart 44.2 at the time of contract award, since team subcontracts are competed for subcontract consent purposes as part of the contractor's proposal, which is subject to the competitive evaluation process prior to award.

## 2) Collusive Team Arrangements

COs must be alert for restrictive bidding patterns where contractors may have agreements with other contractors not to compete or bid against each other for a prime contract to be awarded. In return, the contractor submitting a prime proposal may include other contractors as team subcontractors. For example, EPA contractors who are technically qualified to bid on the prime contract may choose to be proposed as a team subcontractor, perhaps at higher rates, and avoid the preparation of expensive prime proposals.

Restrictive competition reduces the Agency's assurance that it is obtaining the most technically qualified prime contractor at the best price to the Government. Whenever such an arrangement is suspected, it should be referred to the OIG, since such practices may be a violation of the Antitrust Act.

## B) Review of Postaward Subcontracts 1)

## Consent

In general, unless consent requirements are waived as a result of the approval of the contractor's purchasing system pursuant to FAR Subpart 44.3 or otherwise exempted under the applicable FAR subcontract clause, subcontracts awarded after prime contract award require CO consent, and are subject to the requirements of FAR Part 44, "Subcontracting Policies and Procedures."

FAR 44.202-2 lists several factors the CO must review and evaluate before granting consent. Reviewing the proposed subcontract is necessary to assure the following:

a) Was adequate price competition obtained or its absence properly justified? b)

Has the contractor performed adequate cost or price analysis?

c) Is there a sound basis for selecting and determining the responsibility of a particular subcontractor?

d) Does the subcontract contain required flowdown clauses? 2)

#### Need For Subcontract

COs responsible for subcontract consent shall confirm with the PO on whether the technical skills provided by the subcontractor are needed, or are already provided under the contract by the prime or a team subcontractor. COs are responsible for reviewing the reasonableness of rates proposed by post-award subcontractors before granting consent to subcontract; prime contractors are accountable for performing cost or price analyses of proposed subcontractors.

#### 3) Competition

If included in the contract, prime contractors must adhere to FAR Clause 52.244-5, Competition in Subcontracting," where the contractor shall select subcontractors on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract.

COs may only accept justifications for sole source awards if the prime contractor provides substantive evidence that no other responsible party exists, or there are circumstances of unusual and compelling urgency. Statements of uniqueness, including requirements for geographical location, site specific experience, or that the offeror is the only available source, are not an acceptable justification for sole source subcontracting unless adequate documentation is submitted by the prime contractor. In addition, EPA experience or incumbent contractor status rarely should qualify as uniqueness under such sole source awards, absent other supporting factors. Further, lack of planning is not an adequate justification for sole source awards. COs are encouraged to work with the PO to allow prime contractors sufficient time to compete post-award subcontracts, if the prime contractor chooses to subcontract.

#### 4) Subcontract Consent Documentation

COs may provide consent by letter for non-team subcontractors under any contract. For some contracts this is not administratively feasible to identify each subcontract in the contract. Because of the volume in Superfund contracts, for example, non-team subcontracts are usually consented to by letter.

COs are no longer required to identify subcontract ceiling amounts in contracts. Some COs instead establish an aggregate ceiling for all subcontracts, rather than identify a ceiling for each subcontract. This raised the broader question of the necessity of establishing subcontract ceilings in Agency subcontracts. Since the estimated amount of the subcontract is covered by the CO's consent, the identification of a ceiling is technically redundant.

COs may consent to increases in the estimated amount of subcontracts by letter or by contract modification.

However, there are circumstances where it may be appropriate for the PCO to forward the contract file to the ACO without taking action on the request for subcontract consent. In cases where action is not taken, the PCO shall annotate the file on the consent request. An example could be the unavailability of an approved indirect cost rate for a subcontractor. Given the time incident to obtaining an audited rate, it would be more appropriate for the PCO to transfer the file to the ACO without taking further action. Another example is when the proposed subcontract will not be available for PCO review within a reasonable period of time after contract award. In such cases the PCO shall annotate the file as to why no action was taken on the consent request.

If practicable, the PCO should consent to team subcontractors. Having already evaluated the team subcontracts from a technical and financial standpoint, the PCO is clearly the most appropriate individual to provide or deny subcontract consent in the initial contract, if the proposed subcontract has been included in the proposal.

COs should not consent to subcontracts without reviewing the request and supporting data. The review of the subcontract is necessary to assure that the proposed rates, fee, and estimated cost or fixed price amount have been incorporated; the required flowdown clauses have been included; and the payment terms are appropriate. Further, FAR 44.202-2 sets forth factors COs must consider before consenting to subcontracts, some of which require review of the subcontract itself.

#### 5) Directed Subcontracting

Government personnel are prohibited from directing prime contractors to contract

with specific firms, or to assist a prime contractor in selecting subcontractors, or personnel to be used on a subcontract. The underlying reason is that prime contractors are selected, in part, for their management abilities, including subcontract selection and management. COs, with PO assistance, are required to review prime contractor consent requests, including the statement of work, for evidence of directed subcontracting and to decline consent where such evidence exists. If evidence exists of directed subcontracting, the CO is responsible for denying the prime contractor's request to subcontract.

#### 6) Checklist

In order to assist the CO in evaluating a subcontract consent request, a Subcontract Consent Review Checklist (Appendix 44.1A) is provided as suggested guidance for use by the CO. The checklist contains many issues the CO should consider before consenting to subcontract.

**APPENDIX 44.1A SUBCONTRACT CONSENT REVIEW CHECKLIST**

Prime Contractor: -----Contract #: -----  
 Proposed Subcontractor: -----  
 Type of Subcontract: -----  
 Maximum Subcontract Value:----- Period of Performance:-----

**Note:** Subcontract consent may not be required depending on contract type and whether the contractor has an approved purchasing system. (See FAR Subparts 44.2 and 44.3)

<u>Areas of Consideration</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>Comments</u>
1. Is the subcontract for special test equipment or facilities that are available from Government sources?	—	—	—	
2. Is the selection of the particular supplies, equipment, or services technically justified?	—	—	—	
3. Are the subcontractor skills needed?	—	—	—	
4. Are the rates proposed for subcontractors reasonable?	—	—	—	
5. Will the subcontractor assist the prime contractor in complying with its goals contained in the prime contractor's small business and small disadvantaged business subcontracting plan?	—	—	—	
6. Has the contractor obtained adequate price competition or justified its absence?	—	—	—	

DOCUMENT OBSOLETE



<u>Areas of Consideration</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u> <u>Comments</u>
7. Does the contractor have a sound, documented basis for selecting and determining the responsibility of the subcontractor?	—	—	—
8. Did the contractor adequately assess and dispose of the subcontractor's alternate proposals, if offered?	—	—	—
9. Is the proposed subcontract type appropriate for the risks involved and consistent with the FAR?	—	—	—
10. Has the contractor performed adequate cost or price analysis, and obtained current cost or pricing data (if applicable), including the required certificates?	—	—	—
11. Has adequate consideration been obtained for any proposed subcontract that will involve Government-furnished facilities not previously authorized in the contract?	—	—	—
12. Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?	—	—	—
13. Does the contractor comply with applicable cost accounting standards for awarding the subcontract?	—	—	—
14. Is the subcontractor on GSA's List of Parties Excluded From Federal Procurement and Non-Procurement Programs?	—	—	—

<u>Areas of Consideration</u>	<u>YES</u>	<u>NO</u>	<u>N/A</u>	<u>Comments</u>
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been included in the subcontract?

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16. For a cost type subcontract, is the fee within the fee limitations set forth in FAR 16.301-3?

17. Is the subcontract providing for payment of fee on a cost-plus-percentage-of-cost basis?

18. Is the decision to subcontract consistent with the contractor's approved make-or-buy program?

19. Does the proposed subcontractor contain all required Representations and Certifications (either the FAR clause or the prime contractor's format)?

20. Is the Statement of Work (SOW) for the proposed subcontract so restrictive as to limit competition?

21. Does the SOW conform to requirements concerning personal services, inherently governmental functions, and prohibited services?

22. General comments:

**NOTE: Additional comments may be included as an attachment to the checklist.**

In accordance with this review, consent to award the subcontract is hereby recommended.

Recommend:

Contract Specialist

Date

Approved:

Contracting Officer

Date

## Section 44.2 Prohibition of Directed Subcontracting

### 44.2.1 PURPOSE

The purpose of this section is to provide policy regarding subcontracting under EPA prime contracts as there is no contractual relationship exists between the Government and subcontractors ( i.e., no “Privity of Contract”).

### 44.2.2 BACKGROUND

The prime contractor is paid by the Government to manage its subcontracts and can not abrogate this responsibility. The Government cannot intervene or interfere in how the prime manages its subcontractor(s). Since EPA prime contractors have overall authority and responsibility for all contract work, including subcontract performance, no contractual relationship exists between the Government and subcontractors (i.e., no “Privity of Contract”).

This section was originally issued as CMM Chapter 18.

### 44.2.3 AUTHORITY/APPLICABILITY

The authority of this section is FAR Part 44 including FAR 44.202-2 and FAR 52.244-5.

### 44.2.4 DEFINITIONS

- A) Allowable Technical Direction - the clarification of ambiguous or uncertain technical requirements to ensure efficient and effective contractor performance within a contract’s SOW which includes: providing guidance of a general nature to the contractor necessary to perform the SOW; and commenting on and approving reports and other deliverables. Technical direction will be issued in writing or confirmed in writing within five (5) calendar days after verbal issuance.
- B) Directed Subcontracting - the improper practice of requiring the prime contractor to use specific subcontractors, or the mere suggestion of a specific subcontractor or task, unless otherwise authorized in the contract, or by applicable Federal statutes, rules, and/or regulations.
- C) Prime Contractor - the total contractor organization or a separate entity of it, such as an affiliate, division, or plant, that performs its own purchasing.
- D) Subcontractor - any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

- E) Team Subcontractor - a subcontractor that was either submitted by the prime contractor with the initial proposal and approved by the Contracting Officer in the award, or later became part of the team by specific written Contracting Officer approval. Subcontractors proposed after the initial award must be evaluated and approved as specified in FAR 44.202. Once approved, they are considered to be a “team subcontractor” and the prime contractor needs no further approval (contracts may have specific work plan approval procedures that must be followed) to propose and use the team subcontractor for that specific contract, work assignment, or delivery order.
- F) Unallowable Technical Direction - the improper practice of: changing the terms and conditions agreed to in the contract, work assignment, or delivery order which includes, but is not limited to: increasing or decreasing the cost of the contract, work assignment or delivery order; adding or deleting work from a contract, work assignment or delivery order; changing the period of performance; creating an illegal contractual relationship such as a personal services situation; authorizing the contractor to start work prior to the Contracting Officer’s issuance of the work assignment, delivery order or contract; requiring work be assigned directly to subcontractors/consultants; or stopping work or terminating the effort by the contractor.

#### **44.2.5 POLICY**

##### **44.2.5.1 Roles and Responsibilities**

The Contracting Officer (CO), before consenting to a subcontract, reviews the request and supporting data and considers all factors listed in FAR 44.202-2, including: whether the proposed subcontractor is on the debarred or suspended list; technical need for services; compliance with the prime contract’s goals for subcontracting with small disadvantaged business and womenowned business concerns; adequacy of competition; responsibility of the proposed subcontractor; proposed type; terms and conditions of the subcontract; and adequacy and reasonableness of cost or price analysis performed.

The Project Officer (PO) reviews the prime contractor’s request for subcontract consent and provides comments to the CO on the technical need and appropriateness of the supplies or services, the reasonableness of the subcontract estimate in terms of the level of effort, and types and quantities of proposed other direct costs; location, duration, number of travelers and purpose of proposed travel; skill level, labor mix, and direct labor hours to be expended; and the capabilities of the proposed subcontractor.

#### **44.2.5.2 Policy Against Directed Subcontracting**

Federal Acquisition Regulation (FAR) clause 52.244-5, Competition in Subcontracting (Dec 1996), requires subcontracts be awarded competitively, to the maximum extent practicable, for negotiated contracts above the simplified acquisition threshold. Directed subcontracting encroaches upon the prime contractor's responsibility to select and manage subcontractors.

Directed subcontracting undermines the competitive procurement process by denying the Government needed services at the highest quality and best price, which is achieved through competition.

In addition, directed subcontracting may create an improper personal services relationship between the Government and a contractor in violation of FAR 37.104.

#### **44.2.5.3 Prohibited Actions**

- A) The Government's only direct contractual relationship is with the prime contractor. In addition to FAR 44.203, the following activities by Agency personnel involved in contract management are prohibited:
- B) Directing the prime contractor to subcontract with a specific firm. The mere suggestion of a particular firm is improper, unless otherwise authorized in the contract.
- C) Directing that any portion of work should be performed by subcontracting, rather than the prime contractor, unless otherwise authorized in the contract.
- D) Providing technical direction to a subcontractor without the knowledge of the prime contractor, unless otherwise authorized in the contract.
- E) Directly monitoring a subcontractor's technical performance and financial expenditures to the exclusion of the prime contractor. Any technical or financial subcontract problem shall be brought to the attention of the prime contractor, who is responsible for subcontract oversight, and documented in the contract file.
- F) Directing the contractor to subcontract beyond the available appropriation or the end of the contract period of performance.